

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Application of Wisconsin Energy Corporation)	
for Approval of a Transaction by which)	
Wisconsin Energy Corporation Would Acquire)	Docket No.: 9400-YO-100
All of the Outstanding Common Stock of)	
Integrus Energy Group, Inc.)	

**REBUTTAL TESTIMONY OF
DAVID E. HUNGER, PH.D., ON BEHALF OF
WISCONSIN ENERGY CORPORATION**

1 Q. Please state your name and business address.

2 A. My name is David E. Hunger. My business address is 1201 F. Street, NW, Suite 700,
3 Washington, D.C. 20004-1229.

4 Q. By whom are you employed and in what capacity?

5 A. I am a Vice President at Charles River Associates (CRA), a leading global consulting
6 firm that offers economic, financial, and strategic expertise to major law firms,
7 corporations, accounting firms, and governments around the world. Headquartered in
8 Boston, CRA has offices in a number of cities in North America, as well as in Europe.

9 Q. Please describe your education and professional background.

10 A. I have a Ph.D. in economics from the University of Oregon. I am experienced in energy
11 market analysis, and was formerly a senior economist at the Federal Energy Regulatory
12 Commission (FERC). For 14 years at FERC, I led analyses involving mergers and other
13 corporate transactions; market power in market-based rate cases; investigations of market
14 manipulation in electricity and natural gas markets, demand response compensation;
15 compliance cases for Regional Transmission Organizations (“RTOs”); and competition
16 issues in electricity markets. Since leaving FERC and joining CRA in June 2013, I have

1 testified in several FERC proceedings involving the organized markets administered by
2 independent system operators (“ISOs”) and RTOs. I advise multiple companies on
3 market power issues related to FERC’s wholesale energy, ancillary services and capacity
4 markets. Since 2001, I have also been an affiliated professor at the Georgetown Public
5 Policy Institute, where I teach microeconomic theory, energy policy, and public finance.
6 A summary of my background and relevant experience is being offered as Ex.-WEC-
7 Hunger-1.

8 Q. What is the purpose of your rebuttal testimony?

9 A. In their direct testimony, PSCW staff witness Mr. Pilo and Great Lakes Utilities (GLU)
10 witnesses Mr. Kothari and Dr. Lowry discuss whether the proposed acquisition of
11 Integrys Energy Group, Inc. by Wisconsin Energy Corporation has adverse implications
12 for market power. Mr. Pilo, as I read his testimony, seems to conclude that it does not.
13 Mr. Kothari and Dr. Lowry suggest that it might have adverse implications. Because I
14 have analyzed the market power implications of the transaction in great detail, I have
15 been asked to describe the conclusions I have reached and the basis for those conclusions.

16 Q. Please briefly summarize your conclusions.

17 A. Based on in-depth analysis prepared for FERC my conclusions are:

- 18 • The relevant market to be considered is the market for wholesale
19 energy in MISO. The proposed transaction has no adverse
20 implications for market power in that market.
- 21 • While some have suggested that the relevant market is much
22 narrower in geographic scope -- the so-called “WUMS” market --
23 WUMS is not the relevant market. Moreover, even if one did

1 consider WUMS to be the relevant market, the market power
2 implications of the proposed transaction would be minimal and
3 could and would be mitigated by FERC-imposed conditions on
4 their approval of the transaction.

5 Q. What is the basis for your conclusions?

6 A. As I said, I have prepared extensive analysis of this issue as part of the FERC review
7 process for the proposed transaction. I am offering Ex.-WEC-Hunger-2, Ex.-WEC-
8 Hunger-3 and Ex.-WEC-Hunger-4 as exhibit copies of the FERC filings I was involved
9 in preparing along with Dr. William H. Hieronymus, also a Vice President at CRA, with
10 decades of experience in FERC market power issues. Those documents lay out in detail
11 the analysis conducted and the conclusions reached.

12 Q. Can you provide a brief synopsis of the analysis in those FERC filings?

13 A. Certainly. FERC requires merger applicants to analyze whether a merger will adversely
14 affect competition in the wholesale energy, capacity, and ancillary services markets. In
15 order to do that, FERC has established a methodology, based on the FTC/DOJ Horizontal
16 Merger Guidelines, and applied to the unique characteristics of electricity markets,
17 known as the Delivered Price Test (DPT). The DPT essentially asks who could compete
18 in the relevant geographic market under a range of seasonal and load conditions. From
19 there, it calculates the “before the merger” and “after the merger” levels of market
20 concentration, in order to assess the effect of the merge on competition. The concern that
21 FERC has articulated is that significant increases in market concentration could increase
22 the ability and incentive for the merged firm to exercise market power and adversely
23 affect competition in the wholesale electricity markets that it regulates.

1
2 In the FERC proceeding, we analyzed whether the combination of the electric generating
3 assets owned or controlled by Wisconsin Energy and those owned or controlled by
4 Integrys potentially could create or enhance the Applicants' ability to increase prices in
5 the relevant geographic electricity market using the FERC methodology. We also
6 addressed the potential impact of the merger on vertical market power, including barriers
7 to entry that might undercut the presumption that long-run generation markets are
8 competitive and, more specifically, the potential to use control over fuels supplies, fuel
9 transportation facilities, generation sites or electric transmission to exert vertical market
10 power to increase competitors' costs. Using the FERC methodology, we found that the
11 competition would not be harmed in the relevant geographic market (MISO or MISO
12 Classic)¹ because the market was unconcentrated before the merger; and the merger only
13 increased market concentration by a *de minimis* amount.

14
15 A critical part of the analysis (as is the case in any merger analysis) was determining the
16 geographic scope of the market. As discussed in our FERC testimony, we paid
17 considerable attention to whether a smaller geographic area (WUMS in particular) should
18 be considered the relevant geographic market. In order to do this, we examined
19 transmission constraints into and within WUMs and, importantly, prices in WUMS
20 relative to the rest of MISO. We concluded that the transmission constraints did not in
21 any way persistently isolate WUMS from the rest of MISO, and that prices not only did
22 not separate but also were extremely highly correlated between WUMS and the rest of

¹ We referred to the pre-MISO South geographic footprint as MISO Classic. See, FERC Affidavit at p. 7.

1 MISO. Thus there was no indication that WUMS should be considered the relevant
2 geographic market rather than MISO or MISO Classic.

3 Q. What vertical market power concerns are raised with respect to electric transmission
4 facilities?

5 A. With respect to assessing the impact of ownership of electric transmission facilities, the
6 Commission in the past has focused on the extent to which the transmission owner
7 provides open-access transmission or has transferred operational control over its
8 transmission facilities to an ISO or an RTO. The transmission facilities serving
9 Applicants are owned by ATC and are controlled by the MISO RTO pursuant to a
10 Commission-approved open access transmission tariff. Based on Commission policy and
11 precedent, the transaction raises no transmission-related vertical market power issue.
12 Thus, even if Applicants were deemed to wholly control ATC, this would not raise a
13 vertical market power issue. As noted previously, Applicants have agreed that they will
14 not increase their ATC voting rights on matters pertaining to transmission planning,
15 expansion, operations or management beyond what Integrys controls currently.

16 Q. As a former senior economist at FERC, what is your opinion of the market power
17 analysis FERC undertakes when it reviews transactions like the WEC/Integrys
18 transaction?

19 A. Based on my experience when I was at FERC and my years of dealing with FERC since I
20 left the agency, I can say that FERC pays particular attention to a merger's potential
21 impact on competition in the wholesale electricity markets in its overall merger review.
22 FERC's standard of review is extremely rigorous. For example, it requires merger
23 applicants to analyze the effect on competition in the Summer, Winter, and Shoulder

1 seasons under the full range of load conditions within each season; sensitivity studies to
2 check the robustness of the results under various critical assumptions in the analysis;
3 review of the operating costs of every generating facility within the market and one tier
4 outside of the market; and a rigorous and highly conservative estimate of the transmission
5 limitations for competing imports into the market.² If the merger fails the screens in *any*
6 of the season/load conditions under *any* of the required sensitivity scenarios, then the
7 screen is failed and the merger applicants must provide compelling evidence of
8 mitigating factors as to why the merger will not harm competition or, as is almost always
9 the case with a screen failure, mitigate the merger-related harm to competition.

10
11 If the merger does not pass FERC's standard of review, FERC simply will not authorize
12 the merger without specific mitigation that addresses the merger's harm to competition.
13 In past cases, FERC has required asset divestiture;³ transmission upgrades to broaden the
14 scope of the market;⁴ RTO membership;⁵ and behavioral measures such as cost-based
15 offering into the market.⁶ FERC will not authorize the proposed acquisition of Integrys
16 Energy Group, Inc. by Wisconsin Energy Corporation without either a finding of no harm
17 to competition under its rigorous standard of review or adequate mitigation for any harm
18 to competition that it finds.

² *Revised Filing Requirements Under Part 33 of the Comm'n's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001) ("Revised Filing Requirements" or "Order No. 642"). See also *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity and Ancillary Servs. by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,352 at PP 236, 246 (2007) ("Order No 697").

³ See *Exelon Corporation Constellation Energy Group, Inc.* 138 FERC ¶ 61,167 (2012).

⁴ *Oklahoma Gas and Electric Company and NRG McClain LLC*, 108 FERC ¶ 61,004 (2004).

⁵ *American Electric Power Co. and Central and South West Corp.*, Opinion 442, 90 FERC ¶ 61,242 (2000).

⁶ See *Exelon Corporation Constellation Energy Group, Inc.* 138 FERC ¶ 61,167 (2012).

1 Q. Are you able to offer an opinion of the market power review conducted by the Antitrust
2 Division of the U.S. Department of Justice under the Hart-Scott-Rodino process?

3 A. Yes. Although, unlike FERC, the DOJ record in this case is not public, I am very
4 familiar with the methodology and standards of review used by the DOJ. During my time
5 at FERC I was the Staff-lead on the Interagency Meetings between FERC, DOJ and the
6 FTC where we discussed key issues in merger review in the electricity industry. In
7 addition, nearly all of the mergers before FERC were simultaneously being reviewed by
8 the DOJ under the Hart-Scott-Rodino process, and at times the mitigation measures
9 required by the DOJ were a critical part of the FERC requirements to ensure the merger
10 would not harm competition.

11
12 Although DOJ reviews mergers under a different jurisdictional standard than FERC, it is
13 also extremely rigorous in its review and will oppose a merger or require significant
14 mitigation if it finds that the merger would significantly lessen competition in the
15 markets. Like FERC, the DOJ focuses on the merged firm's ability and incentive to
16 exercise market power. Market power is exercised by withholding output in order to
17 drive up the market price. A merger that combines baseload units which run in most
18 hours with units on the margin that can be "withheld" in order to drive up the market
19 price to the benefit of the rest of the merged firm's portfolio would be particularly
20 problematic from the DOJ perspective. As the record indicates, that is not the case here.

21 Q. What is the status of FERC and DOJ review of this transaction?

1 A. The FERC review is still underway. On October 24, 2014, DOJ closed its investigation,
2 which means that it has determined that no further investigation of the competitive effects
3 of the Merger, notably including in WUMS, is warranted.⁷

4 Q. Does this conclude your rebuttal testimony?

5 A. Yes.

⁷ See Fed. Trade. Comm'n, *Wisconsin Energy Corporation; Integrys Energy Group, Inc.*, No. 20141408 (Oct. 24, 2014), <https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notice/20141408>